IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.553 OF 1999

Suesh @ Suryakant Janaji Panchmukh ...Appellant

Vs.

Smt.Vimal Sitaram Panchmukh & Ors. ...Respondents

Mr.Pramod J. Pawar for the Appellant
Mr.Avinash B. Avhad for the Respondents No.1.

CORAM: A.S.OKA, J.
DATED: MARCH 31,2005.

P.C.:

1. On the prayer made by the learned Counsel for the Appellant the order dated 15th March 2002 is set aside and the Appeal is restored against the Respondent No.3.

2. The learned Counsel for the Appellant (Defendant No.3) submitted that in so far as the suit house is concerned, the suit was not maintainable in view of Section 23 of the Hindu Succession Act, 1956. He submitted that a part of the suit property was sold by his father to a stranger and from the said stranger the Appellant has acquired the said property from his own funds and therefore, the original Plaintiff was not entitled to claim any share.

3. In so far as the first contention which is based on Section 23 of Hindu Succession Act is concerned, it is to be noted here that the said contention was not raised by the Appellant in the Courts below. Merely because the suit is

filed in respect of a house unless it is established that it is a dwelling house wholly occupied by the members of the family, the bar created by Section 23 of the said Act of 1956 cannot be applied. There is no such pleadings on the part of the Appellant. No such factual contention has been raised in the courts below. The said contention cannot be raised in the Second Appeal in absence of any such factual foundation in the Courts below.

4. The Trial Court has recorded a finding that the Appellant-Defendant No.2 has failed to prove that the acquisition of the part of the suit property made by him was from his own income. The Trial Court has noted that the Appellant has failed to enter into the witness box to substantiate the said contention.

5. In view of this position, no fault can be found with the decree of the Appellate Court. In fact while deciding the Appeal the Appellate Court has reduced the share of the original Plaintiff in respect of the suit property described in paragraph 1(a) of the plaint.

6. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

Judge.